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UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re
PICONGEN WIRELESS INC.,

Debtor.

Case No. 12-48131 RLE 7

Chapter 7

TRUSTEE'S OPPOSITION TO SOMEONE'S
MOTION TO CONVERT CASE FROM
CHAPTER 7 TO CHAPTER 11

Date: February 13, 2013
Time: 10:00 a.m.
Place: Courtroom 201

The Honorable Roger L. Efremsky, United
States Bankruptcy Judge

Paul Mansdorf, Chapter 7 trustee ("Trustee") opposes the pending motion to convert the Chapter 7 case to Chapter 11.

The Trustee further reports that as of the filing of this Opposition, the "Debtor" has been playing "keep-away" games with the assets that were bid for and were authorized by this Court's order to be sold. On the other hand, as far as the Trustee can tell, winning bidder Sigma Group seems to be playing "cold feet" games, making "delivery" demands upon Trustee. The Trustee has received no funds.

The Trustee has been told that the Debtor's tangible assets are in Mr. Manapragada's garage, that anyone interested in the intellectual property should consult attorney Groover (rather

1 than obtaining any turnovers or disclosures from Debtor), and that none of current management
2 and involved attorneys knows the location of the Debtor's books and records and promissory
3 notes of Mr. Manapragada, and therefore the Trustee should chase former management of Debtor
4 for the information. Presumably, the winning bidder can conduct these gathering activities. But
5 attorney Patrick Costello challenges the rights to the books and records, without any standing to
6 do so.

7 **NATURE AND STATUS OF THE MOTION TO CONVERT**

8 The status of the pending motion to convert the Case to Chapter 11 is unclear. Which
9 entity filed the motion is also unclear. Mr. Costello filed a perfunctory two-paragraph motion to
10 convert in his capacity as "Proposed Special Bankruptcy Counsel for Picongen Wireless Inc."
11 [ECF#34]. The Debtor has never had counsel in this case. Mr. Costello filed an involuntary
12 bankruptcy petition against the Debtor in his capacity as attorney for petitioning creditors Ronald
13 Moeckel, Ankit Sahu, Max Lightfoot, and Mr. Manapragada. [ECF#1] An order for relief was
14 stipulated to by the Debtor's CEO, Dale Kluesing. Before representing the petitioning creditors,
15 Mr. Costello represented insider Mr. Manapragada. After an order for relief was entered, Mr.
16 Costello represented Mr. Manapragada's company, xStream Wireless Works, Inc. in its offer to
17 purchase the assets of the estate. At the January 22, 2013, in-court auction, Mr. Costello
18 represented bidder xStream Wireless AND acted as proposed special bankruptcy counsel for the
19 Debtor. [ECF#41] That alone is a conflict of interest. Now, Mr. Costello has filed a Notice of
20 Appeal from the sale order in which he represents shareholders Mr. Manapragada, Ankit Sahu,
21 Ronald Moeckel, Shara Kumar Yempati, and Max Lightfoot. [ECF#45] Interestingly, in the
22 involuntary petition, Mr. Costello represented Messrs. Manapragada, Moeckel, Sahu, and
23 Lightfoot in their capacity as creditors of the Debtor. There are many people wearing many hats
24 in this case.

25 Mr. Costello refuses to accept any of the responsibilities of representing a debtor in an
26 ongoing bankruptcy case. (See Declaration of Jeremy Katz in support of the Trustee's
27 opposition.) Mr. Costello would not be approved by the Court for employment as counsel for the
28 debtor-in-possession. He would not have undivided loyalty to the Debtor's bankruptcy estate.

1 Mr. Costello asserts that he is “special counsel” and has no other responsibilities than the motion
2 to convert. Likely enough, he is preserving his representation of Mr. Manapragada and offeror
3 xStream Wireless Works. But the motion to convert is a central matter of the Debtor’s Chapter 7
4 and Chapter 11 participation, “conducting the case,” and neither has any court authorized a
5 piecemeal representation nor is there support for doing so. 11 U.S.C. §327(c), (e). A lawyer for a
6 potential buyer should not represent the debtor because of the inherent conflict. *I.G.Petroleum,*
7 *LLC v. Fenasci (In re W. Delta Oil Co.),* 432 F.3d 347 (5th Cir. 2005).

8 The Debtor, a corporation, cannot legitimately be a debtor-in-possession without being
9 represented by counsel, and without an individual who takes responsibility for Debtor’s duties.
10 Counsel’s employment must be approved by the Court. No DIP attorney has been proposed. No
11 responsible individual has been identified.

12 The Debtor cannot legitimately be a debtor-in-possession if it does not demonstrate
13 compliance with the United States Bankruptcy Code. To all appearances, Mr. Costello’s “current
14 clients,” having ousted the persons who were in control of Debtor prior to the January 22, 2013
15 auction sale, have decided that they have no obligation to comply with Debtor’s Section 521
16 duties. Mr. Costello posits that the Trustee must chase the previous management for assets,
17 books and records, and information, and turn that over to new management of Debtor. That is not
18 how it works. Rather, Mr. Costello’s version of the situation yields the conclusion that there is no
19 reality or performance capability residing in “current management” and neither they nor the
20 Debtor can possibly be put in charge of a bankruptcy estate or conduct a legitimate
21 reorganization.

22 **THE FACTS ESTABLISH BAD FAITH**

23 If the current motion is prosecuted not by the Debtor but instead by Mr. Manapragada, as
24 appears to be the substance behind Mr. Costello’s activities, then what is pending is not a Section
25 706(a) conversion motion, but instead a Section 706(b) motion addressed to this Court’s
26 discretion, where the movant(s) have provided no grounds for concluding that conversion is
27 appropriate. Indeed, Mr. Manapragada’s interests as hopeful asset acquirer are in irreconcilable
28 conflict with those of the bankruptcy estate – which therefore needs a neutral fiduciary to be in

1 charge. Since there is no operating business to reorganize, there is no need for that fiduciary to be
2 a Chapter 11 trustee instead of a Chapter 7 trustee.

3 But since the motion is presented on the pretext of effectuating the Debtor's right of
4 conversion absent cause for denial, the Trustee will focus on the facts that support denial of
5 Section 706(a) conversion for bad faith. The record in this Court demonstrates the bad faith
6 involved in a last-minute tactic where an insider apparently does not want to pay the full value of
7 the assets, fair and square against an overbidder he did not plan for. This sale procedure has gone
8 too far for the warring insiders to call a "do-over." And the "new management" is estopped from
9 employing the tactic.

10 It is not unheard of for an insider or insiders to use a bankruptcy filing to acquire a
11 corporation's valuable assets for himself/herself and to clean away other equity holders as well as
12 creditor claims. But there are right ways and wrong ways to go about it. Genuine, without
13 hindrance, exposure of the assets to real, competitive bidding for cash, with an arms-length
14 fiduciary such as a trustee in charge and deciding about the options actually available in the
15 circumstances, can be a right way. Winning the bidding by paying more than anyone else is
16 willing to pay tends to cure the problems otherwise inherent in sales to insiders. Chilling other
17 bids, disparaging the assets, activating "poison pill" tactics intended to convince other bidders
18 that there will be an uphill battle after the auction, playing hide-and-seek with the assets after
19 NOT paying more than the other guy(s) – those kinds of events fail to cure the problems inherent
20 in sales to insiders. Trying to get rid of the arms-length fiduciary and take over the liquidation
21 because the arms-length method didn't provide an unfair advantage to Mr. Manapragada, is
22 something that the Court should not permit precisely because it is an abuse of the bankruptcy
23 system. Trying to obtain conversion to evade legitimate bidding, and persisting with the motion
24 in hopes of undoing the outcome of the bidding and this Court's order can only be described as
25 "bad faith."

26 In prior filings, the Trustee pointed out that a few months before filing the involuntary
27 petition, Mr. Costello in writing on June 19, 2012, on behalf of his client, Debtor's then-president
28 and shareholder Mr. Manapragada, approached other shareholders with a threat of Chapter 7

1 bankruptcy of the company if they did not agree to have their shares diluted as part of obtaining
2 funds for the company. See Exhibit B to a declaration of attorney Costello filed on January 9,
3 2013 in support of the auction sale [ECF #30-2]. For the Court's convenience, the letter is
4 attached to Mr. Katz's declaration in support of this Opposition as Exhibit "A." Mr. Costello
5 disclosed that Mr. Manapragada would seek to acquire the assets of the company in a Chapter 7.

6 Mr. Costello filed the involuntary petition on October 3, 2012 [ECF #1]. Subsequently,
7 on behalf of xStream Wireless Works, Inc. ("xStream"), Mr. Costello represented the "stalking
8 horse" buyer in a \$60,000 cash offer, urging the Trustee that the buyer required a fast closing and
9 that several patent applications had expired and some were about to expire, with no estate money
10 to pay for their renewal. The Trustee negotiated a sale to xStream Wireless Works, subject to
11 bankruptcy court approval and overbid procedures that would ensure that the relevant patent
12 applications did not expire pending court approval of the sale and that the estate would realize
13 money for creditors. On November 30, 2012, the Trustee filed his Motion for Order Approving
14 Sale of Substantially all Assets of the Bankruptcy Estate Free and Clear of Certain Claims of Lien
15 and other Interests (the "Sale Motion") [ECF #15-17].

16 The Trustee disclosed the connections of xStream as the buyer with the Case as follows in
17 his sale motion [ECF #15-1, page 4]: "The Trustee is informed that Mr. Sai Manapragada was
18 one of the founders of the Debtor and principally responsible for the creation of the intellectual
19 property. Sai Manapragada is also one of the petitioning creditors. The Trustee is further
20 informed that Sai Manapragada is a principal of the proposed buyer xStream Wireless Works.
21 The Debtor allegedly made a loan to Sai Manapragada in the approximate amount of \$63,000;
22 however, Sai Manapragada asserts that the Debtor owes him in excess of \$1 million on account of
23 his employment contract and that Sai Manapragada may off-set that amount against the loan from
24 the Debtor."

25 On January 9, 2013, this Court overruled objections to the Trustee's proposed auction sale
26 of Debtor's assets free and clear of liens, as reflected in the order entered January 16, 2013
27 ["Lienfree Order," ECF #32]. A new bidder had appeared, and the in-court auction was set for
28 January 22, 2013. But clearly, paying even the "distressed value" of assets of a now-defunct

1 company at public auction was not what Mr. Manapragada had in mind.

2 On the eve of conducting Trustee's auction sale of Debtor's assets in court on January 22,
3 2013, on the last business day prior to a morning hearing, Mr. Costello, a third party's attorney of
4 record in the Case yet ostensibly representing the Debtor, filed the motion to convert the Chapter
5 7 case to Chapter 11, citing new management and claiming vaguely to have a plan of
6 reorganization in mind. The Trustee opposed the conversion motion and sought to proceed with
7 the auction.

8 At the hearing on January 22, 2013, certain persons appeared through counsel and urged
9 continuance of the auction sale pending the hearing on the motion to convert the Case to a
10 Chapter 11, such as Robert O. Groover III, appearing pro se, Mr. Costello appearing as proposed
11 special bankruptcy counsel on behalf of the Debtor and also on behalf of bidder xStream Wireless
12 Works, Inc., and Robert A. Simon appearing on behalf of the asserted equity security holders.

13 The Court conducted substantial examination into the conduct of various persons
14 including Mr. Costello (regarding who his clients were) and Mr. Manapragada. Prior to holding
15 the auction, the Court heard from Mr. Manapragada to the effect that while he held a fiduciary
16 position in Debtor, he had formed xStream for the specific purpose of operating the same
17 business as Debtor, instead of Debtor.

18 The oral requests for a continuance were denied, and the auction proceeded. From an
19 initial stalking-horse bid of \$60,000 from Mr. Manapragada's creation xStream, the bidding
20 started at \$135,000 from Sigma Group and went to \$351,000 with the winning bidder being
21 Sigma Group.

22 As discussed above and supported by the Declaration of Jeremy Katz, there has been little
23 cooperation with the Trustee in completing the sale authorized by this Court's order entered on
24 January 23, 2013 ["Sale Order", ECF #41].

25 On February 5, 2013, certain shareholders of the Debtor, who filed no opposition to the
26 Trustee's sale motion and who were not heard in their shareholder capacity at any of the hearings
27 other than to request a continuance of the auction, filed a notice of appeal of the Auction Sale
28 Order. ["Appeal", ECF #45"] These shareholders' counsel in the Appeal are Mr. Costello and

1 Texas attorney Robert A. Simon.

2 **APPLICABLE LAW**

3 A person may not take advantage of the case he has set in motion as Mr. Manapragada has
4 done, and then change position. In *In re R.S. Pinellas Motel Partnership*, 5 B.R. 269 (Bankr.
5 M.D.Fla. 1980), Judge Paskay estopped a movant from seeking dismissal of a partnership
6 bankruptcy case when he had participated advantageously in the case. A material issue was that
7 he had caused a trustee to be appointed, who would not be paid if the case were dismissed. Here,
8 Mr. Manapragada chose the Chapter 7 for his own reasons, hoping to profit by the emergency to
9 liquidate fragile assets - obtaining them for a low price. He chose not to fund a Chapter 11
10 reorganization. The sale of the majority of Debtor's asset in Chapter 7, which was once perfectly
11 fine with him and could had been enforced against him had he been the high bidder, would mean
12 that the Case would essentially be over, with distributions as set forth in the United States
13 Bankruptcy Code. Movant here proposes no plan, but no possible plan could be competitive for
14 the best interests of creditors than the Trustee's auction sale. How could assets of this magnitude
15 afford the costs of a Chapter 11, and not render the results to creditors illusory? Mr.
16 Manapragada once bound himself to buy the assets by a bidding process, and should not be
17 permitted to escape from liquidating the assets by that means. He and the shareholders who have
18 joined with him chose not to win the bidding. It would make no sense to allow them to escape the
19 consequences. It would offend public policy to invite competing bidders to do what it took to win
20 the bidding, as part of making the bankruptcy system work, and then pull the rug out from under
21 them by changing the rules after the bidding ended.

22 The Trustee opposes the conversion to Chapter 11 as in bad faith and an attempt to abuse
23 the process of this Court. Mr. Costello presents the matter as if all that were required is a bare
24 motion and the result will follow, contrary to *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365,
25 127 S.Ct. 1105 (2007). The principles of *Marrama* are applicable to conversion from Chapter 7
26 to Chapter 11. *In re Levesque*, 473 B.R. 331 (BAP 9th Cir. 2012).

27 *Marrama* and *Levesque* teach that in applying Section 1106(a) of the United States
28 Bankruptcy Code, the totality of the circumstances must be reviewed in order to determine

1 whether the Debtor remains a typical or instead an “atypical” or “bad faith” debtor, and to prevent
2 abuse of process. Acquisition of control of Debtor’s assets through stock and management
3 control transactions is something that could once have been pursued, but the Trustee urges the
4 Court to find that the attempt to do so now is in bad faith and would be an abuse of the process of
5 this Court.

6 What has been happening in this Case speaks for itself in terms of finding “bad faith” on
7 the part of those who would control the bankruptcy estate through the debtor-in-possession, and
8 most specifically the operative “movant” in the conversion motion. But some caselaw about bad
9 faith is of specific assistance. In *In re Holland*, 317 B.R. 402 (Bankr. C.D.Cal. 2004), debtors
10 engaged in “a pattern of conduct calculated to frustrate [the trustee’s] efforts to market and sell
11 the property for the estate” and then tried to increase their exemption once the trustee obtained an
12 offer. They were denied amendment of their exemptions because of bad faith. “Neither the
13 trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple
14 truth into the glare of daylight.” *Id.* [citations omitted]. In pre-*Marrama* case *In re Maoucherhri*,
15 320 B.R. 880 (Bankr. N.D. Ohio 2004), debtor was denied reconversion to Chapter 13 because o f
16 his failure to cooperate with the trustee pursuant to his duties under 11 U.S.C. §521. The case is
17 widely cited for this bad faith analysis. “At all times during the pendency of a bankruptcy case, a
18 debtor is obligated to cooperate with the trustee regarding the administration of estate assets – not
19 to take efforts which, effectively, thwart the trustee’s ability to perform his statutory duties under
20 §704.” “Throughout the prosecution of a bankruptcy filing, a debtor must exhibit good faith
21 conduct. Such conduct begins with the performance of a debtor’s duties as mandated under §521
22 of the Bankruptcy Code” (citing the duties of cooperation and of turnover). *Id.* at 885.

23 **CONCLUSION**

24 The conflicts in this case are legion. There is no disinterested party who might navigate
25 the Debtor through the choppy waters of a plan of reorganization. The Debtor has no counsel and
26 as a corporation, cannot be a debtor-in-possession without counsel. Mr. Costello certainly cannot
27 qualify to represent the Debtor. This is a case of “who’s on first, what’s on second, I don’t
28 know’s on third.” And there has been absolutely not cooperation with the Trustee. The Trustee’s

1 requests for estate assets have been continuously rebuffed. The bankruptcy system will be
2 disserved if the case where there is no business to reorganize is converted to chapter 11 and the
3 Debtor is put into possession. The motion to convert to chapter 11 must be denied.

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5 Date: February 6, 2013

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